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U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 02 2005

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral researcher in molecular biology at Colorado State University (CSU). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. [redacted] November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner explains that his work focuses on protecting food crops from disease and other environmental stresses. Such an endeavor clearly has substantial intrinsic merit and national scope, but the importance of the petitioner's occupation is not sufficient grounds for granting a waiver; otherwise, every competent scientist performing similar work would likewise qualify for a waiver. It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *Matter of New York State Dept. of Transportation* at 217.

The petitioner submits witness letters with his initial filing. CSU Professor A.S.N. Reddy describes the petitioner's past and present work:

> [The petitioner's] research at Cornell University was on transformation of grapes with antifungal genes and evaluation of transgenic plants for fungal resistance. He has successfully generated transgenic grape plants and demonstrated that introduction of antifungal genes can enhance resistance against fungal pathogens. . . . Because of his expertise in plant biotechnology and genetic engineering I recruited [the petitioner] in 1998 to join my research team as a postdoctoral fellow. During the last five years, [the petitioner has been] involved in four different research projects in my laboratory. . . .
>
> **Genetic engineering of disease resistance in potato:** . . . During the last ten years our group has been working on antifungal proteins and peptides in plants. . . . We have previously isolated antifungal proteins from plants and introduced them into potato plants. [The petitioner] has been evaluating these transgenic plants for enhanced resistance against common potato pathogens. In addition, he has worked extensively on synthetic antimicrobial peptides in combating pathogens. . . .
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> **Characterization of proteins involved in pre-messenger RNA splicing in plants:** The focus of this DOE funded project is to understand the molecular mechanisms involved in controlling gene expression in plants. Studies in recent years indicate that RNA splicing is one of the key steps involved in gene regulation. . . . Our group has isolated and characterized five different proteins involved in pre-mRNA splicing. [The petitioner] has been working on studying the function of a novel serine/arginine-rich splicing factor. Using transgenic plants expressing a reporter gene fused to this splicing factor he has done extensive analysis on the dynamics of this protein under normal conditions and in response to various stresses. . . .

Elucidation of calcium-mediated signaling pathways: . . . The estimates by the USDA indicate that adverse environmental factors contribute to 70% of crop losses in [the] USA. To generate plant[s] that are tolerant/resistant to environmental stresses it is necessary to understand the molecular mechanism by which plants perceive and respond to these signals. Recently it has been demonstrated that most signals . . . elevate levels of cytosolic calcium. . . . Currently, there is considerable research activity in identifying the proteins that interact with calcium/calmodulin complex. [The petitioner] has performed a comprehensive analysis of calmodulin-binding proteins in Arabidosis and bean and isolated a large number of novel calmodulin-binding proteins that are important in calcium signaling. Our long-term goal here is to manipulate the expression of these genes by genetic engineering. . . .

Global analysis of gene expression in plants grown under microgravity conditions on the space shuttle: In a NASA funded project, we have been studying the effects of microgravity on plants especially at the level of gene expression. . . . [The petitioner] and other researcher [sic] in my group are involved in analyzing the expression of genes in seedlings that are grown on Earth and in space in a shuttle mid-deck. This work has resulted in identification of several genes that are differentially regulated in space-flight conditions.

[redacted] asserts that the petitioner's "continued presence in my group is critical for accomplishing the goals of several ongoing federally funded projects."

CSU Professor [redacted] states that the petitioner "has conducted fundamental studies to enhance the resistance of potatoes to early and late blight," and that the petitioner's work "has a very significant potential to contribute to the productivity of U.S. agriculture and help maintain the economic health of our food production system." Professor [redacted] who was the petitioner's doctoral advisor at Cornell University, primarily focuses on the skills that the petitioner has developed, first at [redacted] and later at CSU. [redacted] does not indicate that the petitioner's work has, so far, had an appreciable impact on the field; instead, he discusses the "potential" impact that the petitioner's work "will" have.

The petitioner submits copies of several of his published articles, and copies of ten articles that cite or mention his published work. One article identifies the petitioner's article as "newsworthy," and a second piece amounts, essentially, to a table of the data gathered for one of the petitioner's articles. Several of the remaining citations are group citations, citing several articles at once, often only to indicate that research into a given subject is underway. For instance, an article in *TRENDS in Plant Science* states: "The efficacy in plants of a new class of synthetic antimicrobial peptides is already under intense scrutiny." The sentence is followed by citations to two articles, one of which is by the petitioner. The petitioner's citation record as of the petition's filing date was minimal, and much of it merely acknowledged that the research had taken place.

The director requested additional evidence to demonstrate that the labor certification process would not adequately meet the needs of the prospective employer and the United States, and that a waiver of the job offer requirement would be in the national interest. In response, the petitioner has submitted further letters, articles and other documents.

[redacted] updates the previous list of the petitioner's projects, and asserts that the petitioner "continues to make important contributions to research projects that are funded by federal agencies." [redacted] an associate professor at CSU, states:

> What makes [the petitioner's] skills of exceptional significance to U.S. interest comes from the work started about one year ago. This is a joint project between my laboratory and that of [the petitioner's] lab (headed by Professor A.S.N. Reddy). . . . Our goal in this joint project is to develop plants that will function as simple sentinels for a wide variety of biological and chemical terrorist agents. Plants have already evolved means to sense pathogens and chemicals. We are using these and other mechanisms to develop plants that will sense agents of choice. . . .
>
> This project has attracted considerable National and International attention.

[redacted] letter is dated January 15, 2004, and the project described above "started about one year ago," i.e., circa January 2003. When the petitioner filed the petition in December 2002, his extensive documentation did not mention this project. In a new letter, the petitioner acknowledges that CSU became involved in the above project "[a]fter the submission of my application/petition." A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The petitioner's December 2002 petition cannot be approved on the basis of work that the petitioner had not even begun doing until 2003, and therefore it would serve no constructive purpose to discuss the petitioner's role in the project at length here. If the petitioner desires that his involvement in this project be taken into consideration, the proper course of action would be to file a new petition. At this time, we take no position on whether the petitioner's role in this new project would qualify him for a national interest waiver.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner's work, but finding that the petitioner had not sufficiently demonstrated that the petitioner, as an individual, has had or is likely to have particularly important impact on his field. The director acknowledged the petitioner's published articles, but added that publication is generally expected in the petitioner's field.

On appeal, the petitioner observes that his "post-doctoral job . . . is not considered as permanent," and therefore labor certification is not an option. This merely begs the question of why his temporary employment requires permanent immigration benefits. CIS records show that the petitioner's H-1B nonimmigrant visa has been extended and will remain valid through November 30, 2007. Therefore, the denial of the waiver request does not in any way compel the petitioner's immediate removal from the projects in which he is currently engaged.

The petitioner asserts that "[m]ost of [his] articles are regularly cited by other scientists," but the record documents only a handful of such citations, as discussed above. The petitioner has not shown that his works are particularly heavily cited compared to the work of others in the field. Publications and presentations are not rare privileges accorded to a rarefied few; rather, they are standard means by which new scientific knowledge is disseminated.

The petitioner asserts that "a majority of post-docs are hired to perform actual experimental work," whereas it is his function "to plan and perform experimental work." The petitioner also asserts that his "post-doc position was advertised internationally," implying that his selection for the position demonstrates his superior qualifications. There is no doubt that the petitioner is well-qualified for his current position, but at the same time, we have repeatedly held that there is no university or research facility so prestigious that its employees are to be considered presumptively exempt from the job offer/labor certification requirement which Congress chose to apply to advanced degree professionals, including research biologists.

The petitioner states that he has been "getting valuable research experience," working toward his goal of becoming "full time academic faculty" at a university in the United States. The petitioner states that, in addition to his experience discussed previously, he has "served as a reviewer for a scholarly journal." The petitioner has indeed shown a promising career trajectory, but this is not sufficient to qualify him for a waiver.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.